NO. 16148

United States
COURT OF APPEALS
for the Ninth Circuit

HAMISH SCOTT MacKAY,

Appellant,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Oregon.

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JURISDICTIONAL STATEMENT

This is an appeal from a final Order Dismissing Appellant's Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action. Reference is made to the Petition (R. 3), the Amended Petition (R. 24), the Answer and Return to the Amended Petition (R. 39), and the Order Dismissing

the Petition and Discharging the Writ of Habeas Corpus (R. 58).*

The jurisdiction of the District Court was invoked under Title 28, United States Code, Section 2241, 62 Stat. 964, and Title 5, United States Code, Section 1009, 60 Stat. 237.

The jurisdiction of the Court of Appeals for the Ninth Circuit is invoked under Title 28, United States Code, Section 2253, 62 Stat. 967, and Title 28, United States Code, Section 1291, 62 Stat. 929.

The validity and interpretation of the following statute of the United States is involved: The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, now Section 1251(a)(6)(c), Title 8, United States Code.

STATEMENT OF THE CASE

Hamish Scott MacKay was born 53 years ago in Canada and last entered the United States at North Portal, North Dakota, November 24, 1958. The original warrant of arrest was dated May 25, 1949, and charged that MacKay was an alien subject to deportation in that after entry he was alleged to be a member of an organization, association, society or group that advises, advocates, or teaches the overthrow by force and violense of the government of the United States. The

* In this brief, "(R. ....)" refers to the printed record of the proceedings in the United States District Court, and "(Tr. ....)" refers to Exhibit 1, of the typewritten transcript of the hearings before the Immigration and Naturalization Service.

original hearing was begun on July 24, 1950, and continued from time to time thereafter. During the course of the hearing an additional charge was lodged against MacKay that he was deportable for being a member of the Communist Party after entry into the United States. On May 4, 1951, the hearing officer found that appellant was an alien and that he had been a member of the Communist party from 1936 to 1941 and that he was therefore subject to deportation. This ruling was affirmed by the Board of Immigration Appeals and by this Court in *Mackay v. Boyd,* 218 F2d 666 (CA 9, 1955), cert. denied 350 US 840. On October 28, 1955, appellant filed with the Board of Immigration Appeals a motion to reopen the hearing for the purpose of filing an application for suspension of deportation.

On October 31, 1955, appellant filed a petition in District Court for a Writ of Habeas Corpus against his immediate deportation in order that he might await the decision of the Board of Immigration Appeals. The petition was denied and upon appeal to the Court of Appeals, a restraining order was granted against deportation until the Board of Immigration Appeals could act.

On May 16, 1956, the hearing on the application for suspension of deportation was held and on June 21, 1956, the hearing officer denied the relief requested. The Board of Immigration Appeals affirmed this decision on November 2, 1956.

On February 17, 1958, the Court of Appeals dismissed the appeal to the District Court on stipulation of counsel with leave granted to file an amended petition.

On March 5, 1958, appellant appealed to the Board of Immigration Appeals requesting review of his case in the light of the decision of the United States Supreme Court in *Rowoldt v. Perfetto,* 355 US 115. The Board dismissed the appeal and ordered the appellant to surrender for deportation.

On June 19, 1958, appellant filed a petition for Writ of Habeas Corpus and Complaint for Injunctive Relief in the United States District Court for the District of Oregon and after hearing, the District Judge dismissed the petition and discharged the Writ of Habeas Corpus theretofore issued. In the same Order, appellant was remanded to the Immigration Service for deportation. This order was dated August 15, 1958.

On August 18, 1958, appellant filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit and at the same time applied to the Court of Appeals for an Order restraining the Immigration Service from deporting him during the course of his appeal and enlarging him on reasonable bail. The matter was orally argued to this Court and on August 27, 1958, the Court restrained appellee from deporting appellant during the pendency of the appeal and enlarged the appellant on bail until final termination of the appeal.

The appeal involves the following issues:

1. Whether the Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008 (now Section 1251(a)(6)(c), Title 8, United States Code), is unconstitutional as being in violation of Article 1, Section 9, Clause 3 of the

United States Constitution (Bill of Attainder), the First Amendment to the Constitution, and the Fifth Amendment to the Constitution.

2. Whether there is substantial, probative and reasonable evidence upon which a finding can be based that appellant was a member of the Communist Party of the United States after entry into the United States so as to make appellant deportable under the standards set up by the United States Supreme Court in the case of *Rowoldt v. Perfetto,* 355 US 115.

3. Whether appellant was afforded a fair hearing on his application for suspension of deportation before the Immigration and Naturalization Service of the United States in that the special inquiry officer at said hearing, John W. Keane, was one and the same person who had served as hearing officer upon the initial hearings as to whether appellant was deportable, and had ordered appellant to be deported.

4. Whether the order denying suspension of deportation of appellant was arbitrary, capricious, and an abuse of discretion and otherwise not in accordance with law.

5. Whether appellant is in fact a citizen of the United States and therefore not subject to deportation.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to declare unconstitutional the Act of October 16, 1918, as amended by the Act of June 28, 1940, and as amended by the Internal Security Act of 1950, now Section 1251(a)(6)(c), Title 8, United States Code.

2. The District Court erred in finding that there was substantial, probative and reasonable evidence that appellant was a member of the Communist Party of the United States after entry into the United States and is thus subject to deportation.

3. The District Court erred in failing to find that appellant was denied a fair hearing on his application for suspension of deportation.

4. The District Court erred in failing to find that the order denying appellant's suspension of deportation was arbitrary, capricious, and an abuse of discretion and otherwise not in accordance with law.

5. The District Court erred in finding that appellant is an alien and not a citizen of the United States.

ARGUMENT

I. THE ACT UNDER WHICH THE GOVERNMENT SEEKS TO DEPORT APPELLANT IS UNCONSTITUTIONAL AS A BILL OF ATTAINDER BECAUSE IT INFLICTS PUNISHMENTS AND PENALTIES UPON ASCERTAINABLE MEMBERS OF A GROUP IN VIOLATION OF ARTICLE I, SECTION 9, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

While appellant still maintains that the Act under which the government seeks to deport him is unconstitutional as a violation of due process of law and freedom of speech, and as being an ex post facto law, he recognizes that this Court may feel foreclosed by the decisions of the Supreme Court in *Harisiades v. Shaughnessy,* 342 U.S. 580, and *Galvan v. Press,* 347 U.S. 522. For this reason appellant herewith asserts his claim of unconstitutionality without making further argument at this time.

With respect to the question of whether the Act is a bill of attainder, we do not believe that the Court is in any way foreclosed from considering the matter. On the contrary, we have been unable to find any cases in which the Supreme Court has ruled on the validity of the Act as against the assertion that it is a bill of attainder. In neither *Galvan* nor *Harisiades* is the issue discussed.

Section 1251(a)(6)(c) of Title 8, United States Code, provides as follows:

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> "(6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States;".

This statute constitutes a bill of attainder within the meaning of the Constitution. The Supreme Court, in striking down state legislation as bills of attainder in the cases of *Cummings v. Missouri,* 4 Wall. 277 and *Ex Parte Garland,* 4 Wall. 333 defined the character and purpose of a bill of attainder and the nature of the evil enjoined by the Constitution.

In the more recent case of *United States v. Lovett,* 328 U.S. 303, the Supreme Court further clarified its earlier opinions of this type of legislation. It said:

> "They (Cummings and Garland cases) stand for the proposition that the legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of

> a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the Constitution." (327 US at 305)

Section 1251(a)(6)(c) possesses all the attributes of a bill of attainder. It outlaws by legislative fiat the individuals of a named and ascertainable group and inflicts punishment upon them without judicial trial. The Constitution exists for the very purpose of preventing such arbitrary destruction of human freedom; it exists for the purpose of safeguarding and protecting the individual from what Mr. Justice Story castigated as "An irresponsible despotic discretion (of legislative power), being governed solely by what it deems political necessity or expediency, and too often under the influences of unreasonable fears or unfounded suspicions." He further pointed out:

> "Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitement; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." 2 Story, Commentaries on the Constitution, 1344 (5th Ed.).

The constitutional injunction against bills of attainder applies alike to aliens and citizens. The Court has repeatedly declared that an alien lawfully here is entitled to the same constitutional safeguards to protect his life, liberty, and property as a citizen.

> "His personal rights when he is in this country * * * are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States." *Lem Moon Sing v.*

United States, 158 US 538, 547; *Wong Wing v. United States,* 163 US 228, 238; *Yick Wo v. Hopkins,* 118 US 356, 369.

The framers of the Constitution were not unmindful that bills of attainder had been passed by several states banishing British subjects from American territory or confiscating their property. (Sec. 4g, New York Laws of 1779, Ch. 25; 2 Belknap History of New Hampshire, 1912). Since bills of attainder against aliens were known before the Constitution, there is no basis for the argument that the prohibition against them was intended for the benefit of citizens only. The Constitutional prohibition is in fact by its very terms absolute and unqualified. The limitation is upon the power of Congress to pass this type of legislation regardless of whom it affects. The Constitution simply says that no bill of attainder "shall be passed."

There is no merit in the contention that the deportation does not constitute punishment and that therefore the protection against bills of attainder does not apply. As a matter of fact deportation inflicts literal punishment and constitutes in law a deprivation of rights and privileges, and this has been affirmed by the Courts repeatedly.

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." *Bridges v. Wixon,* 326 US 135, 154.

Mr. Justice Learned Hand in *United States Ex Rel Klonis v. Davis,* 13 F2d 630 (CA 2, 1926) in speaking of an alien long resident who was about to be deported following convictions for crime, characterized deportation as "dreadful punishment." Deportation forcibly separates the alien from his American family and his American friends. It removes him from his home, which is in fact America, and returns him to a strange land. In short, deprives him of what Justice Brandeis has called "All that makes life worth living." *Ng Fung Ho v. White,* 259 US 276, 284.

Even if deportation is held not to be criminal punishment, aliens are still not deprived of the protection of the constitutional prohibition against bills of attainder. On the contrary, legislation imposing no criminal punishment whatsoever has been declared unconstitutional under the prohibition against bills of attainder solely because it deprives individuals of various rights, privileges and salaries. *United States v. Lovett,* 328 US 303; *Ex Parte Garland,* 4 Wall. 333, 337; *Pierce v. Carskadon,* 83 US 234; *Cummings v. Missouri,* 4 Wall. 277.

In the case of *Ex Parte Garland,* supra, the Court stated:

> "The question in this case is not as to the power of Congress to prescribe qualifications but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution." 4 Wall. 379-80.

As Mr. Justice Field in *Cummings v. Missouri,* supra, said at pages 321-322:

> "The theory upon which our political institutions

> rest is, that all men have certain inalienable rights —that among these are life, liberty, and the pursuit of happiness; that in the pursuit of happiness all avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

We think that the paucity of cases in United States judicial history declaring legislative acts to be in violation of the Constitutional prohibition against bills of attainder demonstrates that the doctrine has had deep and widespread acceptance by the legislative and executive branches of our government.

We submit that the legislation which we here question falls squarely within the time honored principle condemning bills of attainder, and we urge this Court to again uphold this bulwark of human freedom by declaring this portion of the Act unconstitutional.

II. APPELLANT IS NOT AN ALIEN BECAUSE HIS FATHER WAS AN AMERICAN CITIZEN. THEREFORE APPELLANT IS NOT SUBJECT TO DEPORTATION.

Appellant's father, James Scott MacKay, was born in Scotland and was naturalized an American citizen in 1900 in North Dakota. Appellant's mother was a native-born American citizen (Tr. 605-6). On June 18, 1903, James Scott MacKay graduated from the University of North Dakota. On the following day he married appellant's mother in the State of North Dakota. Immediately thereafter James Scott MacKay and his wife went to Canada and eventually settled near the city of Calgary

(R. 79-88). Unknown to Mrs. MacKay, her husband obtained a certificate of naturalization as a Canadian citizen on February 8, 1905 (R. 103).

James Scott MacKay returned to the United States, in 1924, with his wife and the appellant, Hamish Scott MacKay, who was born in 1905 (Tr. 605). While in the United States James Scott MacKay attended a chiropractic school in Davenport, Iowa, for about a year, went to the State of Colorado, and there obtained a license to practice chiropractic and did so practice this profession for approximately two years. He returned to Canada in the fall of 1927 and died on February 9, 1928 (Tr. 610). Hamish Scott MacKay last entered the United States of America on November 28, 1928, at North Portal, North Dakota (Tr. 611).

Section 13, Chapter 77 of the Revised Statutes of Canada, 1906, which section was in force at the time James Scott MacKay received his Canadian naturalization certificate, provides that an alien must reside within Canada for a term of not less than three years before he may take and subscribe to the oath of residence and allegiance which are prerequisite to naturalization. As a matter of fact, it may be seen from the form of oath of residence prescribed in the above Chapter 77 that three years residence is required of an alien who aspires to Canadian citizenship. It will be noted that James Scott MacKay entered Canada no earlier than June 19, 1903, and the certificate of naturalization which appears as Exhibit 15 is dated February 8, 1905. It is thus mathematically impossible for James Scott MacKay to have

fulfilled what is obviously a jurisdictional requirement of the Canadian naturalization law. As a result James Scott MacKay's alleged Canadian citizenship was null and void and of no effect.

In this connection, attention is directed to the treaty between the United States and Great Britain dated May 13, 1870, 16 Stat. 775, which provides that citizens of either country naturalized as citizens or subjects of the other shall be treated as citizens of such country by the country of origin. The treaty further provides in Article III thereof that in case citizens of one country naturalized in another country wish to renew their residence in the country of origin, they may be restored to the privileges of citizenship there "on such conditions as that government may think fit to impose."

This Court will take judicial notice that the Dominion of Canada was at all times in question a portion of, and a dependency of, the British Empire. James Scott MacKay was by virtue of his birth in Scotland originally a British subject. His naturalization as an American citizen was in due form and when he went to Canada, his failure to comply with Canadian statutory procedure insofar as his naturalization is concerned must have resulted in continued American citizenship under the aforementioned treaty. This is because any person formerly a British subject desiring to resume his British nationality must do so pursuant to the laws of the particular dominion or province of the British Empire under said treaty, and in no other way.

The government has contended below that the fact

that James Scott MacKay took an oath of allegiance to his Brittanic Majesty when he applied for Canadian citizenship automatically terminated his American citizenship. This view does not give full force and effect to the aforementioned treaty, whose purpose is to eliminate the possibility of "statelessness" as between citizens of Great Britain and the United States. The clear intent of the treaty is to assure that persons are either citizens of the United States or subjects of Britain. They must be one or the other, and not both. By the same token, under this treaty, they cannot be rendered stateless.

If the treaty is construed in this light, when James Scott MacKay went to Canada and applied for Canadian citizenship, he retained his American citizenship until he was validly naturalized as a Canadian. This was never accomplished because his alleged certificate of Canadian citizenship was void from the start because of his insufficient residence in Canada. Thus he remained an American citizen under the terms of the treaty.

If James Scott MacKay was an American citizen, and his wife was also an American citizen by virtue of having been born within the United States, then it follows that appellant is an American citizen. Reference is made to the Act of 1855 which was compiled at page 1268 of the U. S. Compiled Statutes of 1901 and which provides that all children heretofore born or hereafter born out of the limits and the jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States, with one exception not pertinent to this case.

Thus, appellant is in fact a citizen of the United States and is not subject to deportation.

III. APPELLANT WAS NOT AFFORDED A FAIR HEARING ON HIS APPLICATION FOR SUSPENSION OF DEPORTATION BECAUSE THE SPECIAL INQUIRY OFFICER PRESIDING AT SAID HEARING WAS ONE AND THE SAME PERSON WHO HAD SERVED AS HEARING OFFICER IN THE INITIAL HEARINGS ON APPELLANT'S DEPORTABILITY AND HAD ORDERED APPELLANT DEPORTED. HE WAS THEREFORE BIASED AND PREJUDICED AND COULD NOT HAVE BEEN AN IMPARTIAL INQUIRY OFFICER AS REQUIRED BY LAW.

John W. Keane was the presiding officer at the hearing which was held to determine if appellant was a deportable alien. At the conclusion of that hearing the said John W. Keane on May 4, 1951, issued a lengthy decision holding that the appellant was deportable for having been a member of the Communist Party after entry into the United States. In the course of this decision the hearing officer necessarily passed upon the conflict in testimony between appellant and his character witnesses on one hand and the government's witnesses on the other. The hearing officer chose to believe the government's witnesses and credited their testimony that appellant had been a member of the Communist Party and had attended Communist Party meetings with them. Appellant testified that he was not a member of the Communist Party and had never been a member. In arriving at his conclusion, the hearing officer thus indicated his belief that appellant lied and that the government witnesses told the truth.

> "It is highly improbable that the testimony of the government witnesses is a fabrication. The

record will not sustain such a determination." (Decision, page 16).

On May 16, 1956, appellant's case was reopened for further hearings in regard to his application for suspension of deportation. The special inquiry officer for the reopened hearing was one and the same John W. Keane who presided as hearing officer in the previous hearings. Counsel for appellant objected in the following lanaguage:

> " * * * May the record further show that the petitioner until this moment or until this hearing was begun at approximately 9:30 A.M. on this day, we were not advised of who any hearing officer would be or any presiding officer would be, and I was just advised of that when I walked in this room and see we are assigned here. We object to your being the hearing officer here on the ground and for the reason that you have participated in the deportation, and it would be based on your findings and decision on matters in this proceeding that would determine somewhat his right to suspension, so we object to your sitting as a hearing officer in this proceeding on the ground and for the reason that you have heretofore participated in these deportation proceedings."

By the special inquiry officer:

> "The objection is overruled." (Tr. 801).

The fact that hearing officer Keane's appraisal of appellant's honesty and veracity affected his decision on his application for suspension of deportation is shown by his order of June 21, 1956, denying suspension of deportation. In said order the hearing officer found that "On the record the respondent has established statutory eligibility and the case is one in which the

Attorney General, or his authorized delegate, may determine whether in the exercise of his discretion suspension of deportation is warranted" (page 3).

The hearing officer then proceeded to analyze the testimony of appellant and characterized it as "evasive" and inferred from such testimony "an attitude from which it might well be inferred that what would be revealed by the answers would not add to alien's desirability as a resident" (page 3).

Finally, the hearing officer concluded:

> "Even if his deportation would cause him extreme and unusual hardship and his deportation would result in hardship to his wife and minor child, *on the basis of the entire record* in the respondent's case, the discretionary relief of suspension of deportation should be denied." (Pages 3-4) (Emphasis added).

Thus in his decision as hearing officer in the reopened hearing, Mr. Keane clearly permitted his impressions of appellant gained at the first hearing to sway his judgment in the second hearing. In effect the second hearing was only a matter of formality. Its result was in fact determined before it ever began. Mr. Keane had in effect decided that appellant was a liar and his conclusion could only be that he would not grant suspension of deportation to a liar.

Under these circumstances it is clear that appellant has been denied an elementary aspect of due process of law, namely the right to a hearing before an impartial judge or hearing officer. While the Immigration and Naturalization proceedings have been exempted from

the requirements of the Administrative Procedure Act, nevertheless due process as a constitutional requirement applies to all of the proceedings. *Marcello v. Ahrens,* 212 F2d 830. That Congress itself recognized the necessity for a fair and impartial hearing with respect to deportation matters can be seen from the language in Section 1252(b), Title 8, United States Code, which says in part:

> " * * * No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions."

Surely the hearing on the application for suspension of deportation, which was designated in the record as "A Reopened Hearing," must be conducted according to the same standards as a hearing on the original deportation charges. When Mr. Keane made up his mind that appellant was a liar and was deportable he certainly could not pretend to preside at the hearing on suspension of deportation as a wholly impartial special inquiry officer. On the contrary he was as biased as an investigator might have been or someone who performed prosecuting functions. In fact it might be said that he was more biased as a result of weighing the evidence and coming to the conclusion which he did.

For these reasons, appellant was denied due process of law and a fair hearing on his application for suspension of deportation.

IV. THE ORDER DENYING APPELLANT SUSPENSION OF DEPORTATION WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION, AND OTHERWISE NOT IN ACCORDANCE WITH LAW.

Section 1254(a)(5), Title 8, United States Code, provides the legal basis for suspension of deportation. To obtain the benefits of suspension, an alien is required to establish under this section that he has been a person of good moral character for a continuous period of not less than ten years after the act which allegedly makes him deportable, and that during this time he has not brought himself within one of the deportable classes mentioned in the section. The special inquiry officer found that the appellant met these statutory requirements and in addition the requirement that his deportation would result in "exceptional and extremely unusual hardship."

> "On the record the respondent has established statutory eligibility and the case is one in which the attorney general, or his authorized delegate, may determine whether in the exercise of his discretion suspension of deportation is warranted." (Decision of the special inquiry officer, page 3.)

The Board of Immigration Appeals in its decision of November 2, 1956, affirmed the special inquiry officer's findings that suspension be denied. The basis of the Board's action was that the appellant refused to disclose certain information in connection with the Oregon Committee for the Protection of the Foreign Born, an association which was formed to assist defending persons whom the Immigration Service seeks to deport.

As the record will show (commencing with Tr. 848 ff.) the examining officer attempted to inquire as to the officers of the Oregon Committee for the Protection of the Foreign Born and with respect to certain persons apparently connected with it. At the time these questions were put to appellant, counsel for appellant objected to each of the questions and his objection were overruled by the special inquiry officer.

It should be noted that at no time did the special inquiry officer order the appellant to answer any of the questions which were put to him. As a matter of fact, appellant answered a great many questions about the Oregon Committee for the Protection of the Foreign Born but drew the line at mentioning or discussing the names of individuals who might have been connected with it.

We think that it is clear that the special inquiry officer erred in his overruling of the various objections made by appellant's counsel during the course of this questioning and that further, appellant should not be deprived of suspension of deportation because he failed to answer questions which were not pressed by the government.

It has long been established that the order of the Board of Immigration Appeals denying suspension of deportation is judicially reviewable. *McGrath v. Kristensen,* 340 US 162; *Shaughnessy v. Pedreiro,* 349 US 48; *Acosta v. Landon,* 125 F. Supp. 434 (DC Cal, 1954).

The issue on review is whether the Board abused this discretion in denying suspension of deportation.

Certainly one of the hallmarks of abuse of discretion is to deny an alleged alien the benefits of suspension of deportation by reason of his refusal to answer questions which on their face seem in no way relevant to the determination of whether or not he is entitled to suspension. This is certainly true of questions about the Oregon Committee for the Protection of the Foreign Born. There is nothing in the record which would in any way cast doubt upon the legality of the organization, nor any aspects of its program in defense of aliens. If the government implies that any effort to oppose the Immigration Service's determined efforts to deport various individuals to whom it appears to have taken a strong dislike constitutes grounds for denial of suspension of deportation, the government should frankly come forth with this admission. If it has evidence that the Oregon Committee for the Protection of the Foreign Born is an association with which aliens can have contact only at the peril of losing their rights to suspension of deportation, it should so establish its charges by competent evidence.

Instead, the government chooses to take a more devious path. It inquires of an applicant for suspension not only as to the activities of the Oregon Committee but attempts to find out the names of all those with whom the alien is familiar as leaders or members of the group. The implication is clear that when the government finds out these names, it could use them to their disadvantage, especially if they were aliens subject to possible deportation.

Surely appellant's refusal to give these names, and counsel's objections to the questions, on the basis of the record in this case should not be used against appellant in the way which the Board of Immigration Appeals has done.

The test of whether or not the Board of Immigration Appeals abused its discretion in denying suspension to appellant is that of ultimate fairness. On the record in this case it is clear that appellant has been denied this fairness and for this reason the order denying suspension of deportation should be reversed.

V. APPELLANT IS NOT A PERSON SUBJECT TO DEPORTATION BECAUSE THERE IS NO SUBSTANTIAL, PROBATIVE OR REASONABLE EVIDENCE UPON WHICH A FINDING THAT APPELLANT WAS A MEMBER OF THE COMMUNIST PARTY AFTER ENTRY INTO THE UNITED STATES CAN BE BASED. THE EVIDENCE SUPPORTING DEPORTABILITY IS INSUFFICIENT UNDER ROWOLDT V. PERFETTO, 355 US 115.

In *Galvan v. Press,* 347 US 522, the Supreme Court described the test to be applied in determining whether membership in the Communist Party had been established for the purpose of deportation. The Court said there must be substantial evidence for a finding that an alien committed himself to the Communist Party "aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will." 347 US 522, 528.

Thereafter, the Board of Immigration Appeals considered any proof of membership in the Communist Party as sufficient to sustain an order of deportation.

Matter of G., File No. 4-524774. The Board deemed adequate for this purpose the testimony of paid witnesses that an alien had been seen at closed Communist Party meetings, and that he had been observed paying dues. No further evidence was thought necessary to sustain an order of deportation.

But in *Rowoldt v. Perfetto,* 355 US 115, the Supreme Court reiterated the test laid down in *Galvan* and went further by requiring an order of deportation be supported by "substantial" proof that an alien had a "meaningful association" not wholly devoid of "political implications." In *Rowoldt,* the alien admitted having been a member in the Communist Party for about a year; that he attended Communist Party meetings, and paid membership dues. Rowoldt, furthermore, worked in a Communist Party bookstore in which Communist and Marxist literature was sold. He demonstrated a high degree of knowledge about Communism and the history of the Russian revolution. He testified that his reason for joining the Communist Party was his concern to improve economic conditions during the depression.

Section 1252(b)(4) of Title 8, United States Code, demands that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

The harsh penalty of deportation should, of course, never be imposed if the government's evidence is weak or merely a *prima facie* case. Indeed, the conventional requirement that administrative orders be supported by "substantial" evidence is changed in this act by adding

the further requirements that such evidence be "reasonable" and "probative." This means that the evidence must not only be substantial, that is, sufficient to carry the case to a jury under the conventional common law test of a *prima facie* case, but also "reasonable," that is, in the eyes of the reviewing court believable, truthful, and in all respects completely satisfying as to the alleged facts.

This much cannot be said for the evidence produced by the government in this case. Mr. Lee A. Knipe was the first witness for the government (Tr. 13). He testified that he had seen appellant at closed meetings of the Communist Party, of which he was also a member (Tr. 14-15). Knipe also testified that he had seen appellant at a Communist Party school for the purpose of electing one James Murphy state senator in 1938 (Tr. 17). On cross-examination Knipe admitted that he had never seen appellant's Communist Party membership book and had never seen him pay any dues to the Communist Party (Tr. 18). He also testified that on previous occasions during twelve days immediately preceding the hearing, he had testified in other cases of this sort (Tr. 18). His memory about the details of the Communist Party meetings at which he allegedly saw appellant seems very vague indeed (Tr. 19-20). Finally he testified that he had never seen MacKay circulate any literature of any kind (Tr. 21).

The government's next witness was Irene Mahoney, who was previously Irene Knipe, wife of witness Lee A. Knipe (Tr. 27). She also testified that she knew appellant to be a member of the Communist Party

and had seen him at party meetings. She was unable to testify as to any of appellant's other alleged activities in the Communist Party. On cross-examination (Tr. 27-90) Mrs. Mahoney showed an amazing lack of recollection of the most obvious facts of her life during the time she claimed to know appellant as member of the Communist Party. As a matter of fact, it is remarkable indeed that she definitely remembered that appellant was a member of the Communist Party, although she was able to add little else about this relationship. Yet she forgot a vast number of dates, her employments, her residences, and people during this same period of time. After reading her testimony in full, one can only conclude that she was wholly unreliable in her testimony and it should be discounted in full.

The third government witness was Robert McClure Hood, who testified that he had joined the Communist Party in 1940 (Tr. 442) and remained a member until about March 1942 (Tr. 442). He testified that he joined at the instigation of an officer of the Portland Police Department (Tr. 443). He stated that he was a paid spy for the police department (Tr. 444) and that he made his living in this way (Tr. 444). He testified that he was also active in the Workers' Alliance.

He stated he had seen Hamish Scott MacKay at Communist Party meetings and that he did not hold any office in the Albina Branch of the Communist Party to which Hood belonged (Tr. 452). He also recalled a particular meeting where appellant was present where there was a discussion as to how the Communist Party was backing the war effort of the Soviet Union (Tr. 454).

In sum and substance the testimony of Hood amounts only to the charge that appellant had attended meetings of the Communist Party. It does not shed any light upon his motives or his possible interest in joining the Communist Party.

The last witness produced by the government was Sylvia N. Sivertson, the former wife of appellant. Mrs. Sivertson and the appellant were married December 30, 1933, and he obtained a decree of divorce in 1944. She testified that appellant had been a member of the Communist Party since 1935 and that she went with him to Communist Party meetings, usually at friends' homes. She also testified that she herself had been a member of the Communist Party and had paid dues to it. She testified she knew Lee A. Knipe and Irene Mahoney and that she did not remember Robert McClure Hood. On cross-examination Mrs. Sivertson admitted the appellant obtained the divorce and was awarded the care and custody of their minor children (Tr. 764). She also admitted that she had been doing a great deal of drinking but claimed that it was arguments about the Communist Party that lead to this (Tr. 763, 765). She admitted that she had been arrested in Portland on charges of being drunk and was confined to jail (Tr. 766). Although she claimed to have been active in the Communist Party with her husband, she was unable to remember any of the details as to leaflets and literature she claimed to have helped distribute (Tr. 773).

The appellant's witnesses Gladys Nelson, Carl Nelson, and Dorothy MacKay all testified that Mrs. Sivert-

son drank excessively and was not a truthful person (Tr. 782-792).

Appellant himself testified (Tr. 792-797) that his former wife, Sylvia N. MacKay Sivertson, was divorced because of her excessive use of intoxicating liquor and her desire to run around (Tr. 792). He claimed that the so-called Communist Party meetings which she testified they both attended were instead meetings of the Workers' Alliance and International Labor Defense (Tr. 794).

It seems apparent from the record that there is a strong motive for Mrs. Sivertson to lie about appellant's alleged connections with the Communist Party. That motive, pure and simple, is revenge. She simply wished to get even with appellant for obtaining a divorce from her and the custody of the children.

In light of the witnesses who were called to impeach her veracity, her testimony cannot be viewed as creditable or in any way sufficient upon which to base a finding of deportation.

Thus when the government's case is analyzed and the testimony of the government witnesses looked at critically, instead of being accepted as one hundred per cent truthful as the Board of Immigration appeals and the special inquiry officer did, it can be readily seen that no substantial, reasonable, or probative evidence was produced so as to warrant the extreme penalty of deportation to be inflicted against the appellant. On the contrary, we believe that justice requires a reversal of the District Court's order.

CONCLUSION

Appellant believes he is not an alien and is therefore not subject to deportation. If he is, in any case, the statute under which the government seeks to deport him is unconstitutional and should be so declared. Even under the statute, the government has not proven its case by substantial, reasonable, and probative evidence that he was a member of the Communist Party within the meaning of that term as interpreted by the United States Supreme Court. Finally, the record is clear that appellant has been denied a fair hearing on his application for suspension of deportation by reason of the hearing officer being one and the same person who had previously ordered him to be deported. The hearing officer's denial of suspension of deportation and its affirmance by the Board of Immigation Appeals was abuse of administrative discretion and is not supported by the record.

The order of the District Court should be reversed with instructions to grant the relief prayed for in the appellant's amended petition for Writ of Habeas Corpus and Injunctive Relief to Prevent Agency Action.

Respectfully submitted,

NELS PETERSON,
GERALD H. ROBINSON,
Attorneys for Appellant.

EXHIBITS ADMITTED INTO EVIDENCE

Exhibit No.	Offered	Admitted
1	R. 102	R. 102
15 (of Immigration Service hearing)	R. 103	R. 103